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No. 1027

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

EDWARD MALLINCKRODT, JR.,
Petitioner,

vs.

JOSEPH D. NUNAN, JR., COMMISSIONER OF INTERNAL REVENUE,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

The petitioner, Edward Mallinckrodt, Jr., prays that a writ of certiorari issue to review a judgment of the Circuit Court of Appeals for the Eighth Circuit affirming a judgment of the Tax Court of the United States.

Opinions Below

The opinion of the Tax Court (including the concurring and dissenting opinions) (R. 82-119) is reported in 2 T. C.

1128. The opinion of the Circuit Court of Appeals (R. 355-364) is reported in 146 F. 2d 1.

Jurisdiction

The judgment of the Circuit Court of Appeals sought to be reviewed was entered January 10, 1945 (R. 364). Petition for rehearing seasonably filed by petitioner (R. 365) was denied on January 29, 1945 (R. 373). The jurisdiction of this Court is invoked under Section 240, as amended, of the Judicial Code (28 U. S. C., Section 347).

Question Presented

A trust was established by a father in 1918 for the benefit of a son and others, with the son and a Trust Company as co-trustees. Until 1933 the income of the trust was used to pay off debts and burdens of a building enterprise as directed by the donor. In the period 1934 (—) 1937, inclusive, income became available which, under the terms of the trust, would have been paid to the son, as beneficiary, had he so requested of the other co-trustee. No such request was made in 1934 and 1935. In 1936 and in 1937 only a part of the trust income was paid to third parties at the request of the son and the undistributed income of the trust for each of the four years, pursuant to the express terms of the trust, became part of the principal of the trust estate, subject to the right of the son to dispose of it by will. The question is whether the income which the son could have received upon request, but which he did not request, was taxable to him as his income instead of to the trustees who actually reported the income as taxable to them and paid the tax thereon for each year.

Statutes Involved

The applicable provisions of the statutes involved are set out in the Appendix, *infra*, pp. 23-24.

Statement

Edward Mallinckrodt, Sr. (who died in 1928) on April 17, 1918, executed a trust instrument (R. 261), by which he transferred to St. Louis Union Trust Company and the petitioner, as trustees, property and securities under the terms and conditions stated in the instrument. At the time this trust was created, the grantor's family consisted of petitioner, petitioner's wife, and their three sons. The grantor's intention in creating the trust was primarily to provide for petitioner's children and grandchildren (R. 135-140). Petitioner had already received a large amount of property from his father.

By the terms of the trust instrument, the net income of the trust was to be devoted first to paying certain debts, obligations, and burdens growing out of a building enterprise (R. 267), and, after those obligations had been paid and satisfied in full, then: to pay out of the annual net income $10,000 per year to the wife of petitioner during their joint lives; to pay the residue of such annual trust income to petitioner during his life, upon his request; to accumulate the undistributed annual net income and, at the end of each year, to add it to the principal of the trust estate (R. 268-269). The trust instrument conferred upon petitioner a testamentary power of appointment over the corpus of the trust estate (R. 280), but provided that if he did not exercise the power, the trust should continue after his death for the benefit of his widow, his children, and the

descendants of his children, and, upon certain contingencies, for the benefit of others.

The trustees were empowered, upon the written request of petitioner, during his lifetime, but subject to the approval of both trustees, to "convey or pay to" him "such portions of the principal of the trust estate as it may seem wise to the Trustees to distribute to him for his benefit or that of his family; * * *." (R. 279). The trust was subject to termination during the lifetime of petitioner "at the discretion of the then Trustees, in case they shall decide that such earlier termination is advisable or desirable in the interest of said 'Arcade Building Enterprise', or for any other reason in the interest of the estate then held in trust or of the beneficiaries thereof." If the trust were terminated during the lifetime of petitioner, he was, by the terms of the trust instrument, to have all of the assets of the trust estate (R. 282). Petitioner was authorized to appoint, by will or by written instrument, his successor trustee, and, if no successor were named by him, the St. Louis Union Trust Company was to be the sole trustee (R. 281).

The debts, obligations, and burdens of the Arcade Building Enterprise referred to in the trust instrument were fully paid and satisfied out of the income of the trust estate by 1933 (R. 133-139).

In 1934 and thereafter, the trustees paid to petitioner's wife $10,000 each year out of the annual income of the trust (R. 256). The petitioner made no request that any of the income of the trust be paid to him in 1934 and 1935. In 1936, upon petitioner's request, of the trust income the trustees disbursed $15,000 to certain educational and charitable organizations, and $4,075.82 to a trust which petitioner had created for the benefit of his wife (R. 294). Petitioner reported in his income tax return for 1936 so much of the $15,000 distribution as was taxable (R. 131).

He did not report in his return the taxable portion of the $4,075.82 distribution. In 1937, the trustees distributed out of trust income, upon petitioner's request, $3,109.14 by transferring that amount to the trust which he had created for his wife's benefit (R. 131). The taxable portion of this distribution was not included in petitioner's income tax return for 1937. During each of the taxable years, petitioner's wife reported and paid the tax upon the $10,000 of trust income which was distributable to her and which she received from the trustees (R. 256). All of the undistributed net annual income of the trust for each of the years in question was reported by the trustees as income taxable to the trust, and they paid the tax due upon it (R. 132). At the end of each of the years, the trustees, as directed by the trust instrument, added the undistributed net income for that year to the corpus of the trust (R. 347).

Respondent determined that the undistributed trust income for each of the years was taxable to petitioner (R. 57-59, 62-64). The Tax Court sustained respondent's determination (R. 82-95), on the theory that the undistributed trust income was taxable to petitioner under Section 22(a). Five judges dissented (R. 114-119), on the theory that the undistributed trust income was taxable to the trust estate under Sections 161 and 162. The Circuit Court of Appeals affirmed (R. 364), on the theory that the undistributed trust income was taxable to petitioner under Section 22(a) and relied upon "implications" deducible from prior decisions.

Specifications of Error to Be Urged

The United States Circuit Court of Appeals for the Eighth Circuit erred:

1. In affirming the judgment of the Tax Court holding petitioner liable for tax upon the undistributed income of the trust estate not received by him.

2. In failing to hold that the entire undistributed income of the trust not received by petitioner was taxable to the trust estate under the provisions of Sections 161 and 162 of the Revenue Laws.

3. In emasculating the express, unambiguous, and specific provisions of Sections 161 and 162, and applying by implication, in their stead, the general provisions of Section 22(a), contrary to the principles of prior decisions of this Court.

4. In holding that the undistributed income of the trust estate not received by petitioner was taxable to him under the provisions of Section 22(a) of the Revenue Laws.

5. In failing to hold that the undistributed income from the trust estate, which was not "to be distributed currently by the fiduciary," was taxable to the trust estate and not to petitioner.

6. In misconstruing language used in earlier decisions of this Court, dealing with situations where no bona fide trust had been created and income was held taxable to the donor, to warrant taxation of a beneficiary, other than the donor, for trust income where a bona fide trust was created and the beneficiary had a power to acquire the income but did not exercise the power.

7. In resting its decision upon "implications" drawn from the opinions of this Court in *Corliss* v. *Bowers*, 281 U. S. 376, 378, and *Helvering* v. *Clifford*, 309 U. S. 331, which implications are completely hostile to the express provisions of Sections 161 and 162 of the Revenue Laws.

Reasons for Granting the Writ

In holding the beneficiary of a bona fide trust liable for tax on undistributed trust income which he never received

but which income was taxable to the trust estate under unambiguous statutes, the decision of the court below deals with a question of great and continuing importance in the construction and administration of Federal revenue laws. In effect, the decision below is a repeal by judicial interpretation of an unambiguous statutory scheme for taxation of trust income, and conflicts with principles applied in applicable decisions of this Court in the interpretation of the Federal tax statutes involved. The basic unsoundness of the decisions by the Tax Court and the Circuit Court of Appeals, attributable to their misconception of the meaning and effect of certain language employed by this Court (not involved or necessary to its decisions), is and will be a source of confusion to donors, beneficiaries, trustees, taxpayers, administrative officers, and all lower courts until clarified in the public interest.

1. Unambiguous statutory scheme for taxation of trust income should not be emasculated by judicial construction. —The decision of the court below relying on Section 22(a) is in disregard of and violates the plain language of Sections 161 and 162 of the Revenue Laws.

Special statutory provisions control as against the general law.—Sections 161 and 162 are statutes dealing *particularly* and *specially* with the taxation of *trusts*. Beginning with the Revenue Act of 1928, a separate subdivision headed "SUPPLEMENT E—ESTATES AND TRUSTS", has appeared in each Act, and every such subdivision has contained, in substance, Sections 161 and 162, *supra*. On the other hand, Section 22(a) is a *general* provision.

It is an old and familiar rule, repeated almost innumerable times by the Federal Courts, that where there is, in the same statute, a *particular* enactment, and also a *general* one, which in its most comprehensive sense would include the former, the *particular* enactment must be operative,

and the *general* enactment must be taken to affect only such cases within its general language as are not within the provisions of the *particular* enactment. *United States* v. *Chase*, 135 U. S. 255, 260; *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208; *MacEvoy Company* v. *United States*, 322 U. S. 102, 107; *Sanford* v. *Sanford*, 286 Fed. 777, 780; and *Townsend* v. *Little*, 109 U. S. 504, 512.

Statutory scheme for taxation of trusts.—Under the statutory scheme, a *trust* pays the tax upon its *whole* taxable income, *except* so far as particular *deductions* are authorized by the statute.

Section 161(a) lays down the rule that "the taxes imposed by this title upon *individuals* shall apply to the income of estates or *of any kind of property held in trust*." (Emphasis supplied)

In other words, a *trust* is a taxable entity, and is to be taxed on *its* income as if it were an individual, except as otherwise provided by the *particular* provisions of Sections 161 and 162.

Under clauses (1), (2), and (4) of Section 161(a), the income of the trust includes (1) income accumulated for unborn or unascertained persons, or held for future distribution, (2) *income "which is to be distributed currently by the fiduciary to the beneficiaries,"* and (4) income which, in the discretion of the fiduciary, may either be distributed or accumulated.

By paragraph (b) of Section 161, the tax is to be computed upon the *net* income of the trust, and *shall be paid by the fiduciary* in all cases, *except* in the case of a *revocable* trust, or where the grantor retains a right to the benefit of the income of the trust created by him, which exceptions are provided for by Sections 166 and 167 of the Revenue Acts in question.

By the initial clause of Section 162 the net income of the trust must be computed in the same manner and upon the same basis as in the case of an individual, *except that*—

> "b. There shall be allowed as an additional deduction in computing the net income of the * * * trust the amount of the income of the * * * trust for its taxable year *which is to be distributed currently by the fiduciary to the beneficiaries,* * * * but the amount *so* allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not * * *." (Emphasis supplied.)

We submit that, under the provisions of Section 161(a), the income of the trust includes not only what is retained, but what is currently distributable, under the terms of the trust. In other words, under the statutory scheme, a trust pays upon its *whole* taxable income, *except* so far as particular deductions are authorized by the statute.

Deductions allowed to trusts.—The only statutory provision (peculiarly applicable to trusts) which authorizes a deduction from its income by a trust, on account of a distribution, or a duty of distribution, to beneficiaries, is contained in Section 162(b). That provision is the *crux* of this case. Only the amount of the income (for the taxable year) "*which is to be distributed currently by the fiduciary to the beneficiaries*" can be deducted. Unless the particular instance falls within that language, the trust must pay the whole tax, and there is no deduction. Since under the trust here in question the income not requested is directed by the trust instrument to be added to corpus, it is "income accumulated or held for future distribution under the terms of the will or trust," and is taxable to the trust, no deduction therefor being allowed by the statute.

Meaning of words "to be distributed currently" in Section 162(b).—Apart from the sum of $10,000 directed to be

paid annually to wife of petitioner out of the income of the trust, the trust income was *not "to be distributed currently by the fiduciary."* The Circuit Court of Appeals for the Eighth Circuit correctly so held. That Court said (R. 362):

> "We think that the undistributed income of the trust in suit was not income 'to be distributed currently' by the fiduciaries to petitioner as beneficiary, within the meaning of Section 162(b). This, for the reason that, by the terms of the trust instrument, the trustees could not distribute trust income to petitioner except upon his request, and were obliged to accumulate and add to trust corpus all undistributed net income at the end of each year. The trustees were bound to abide by the exact terms and conditions of the trust instrument. By its terms, trust income was not distributable to petitioner unless he elected to withdraw it by requesting that it be paid to him."

The words "to be distributed currently" presuppose a *periodic duty* on the part of the trustee. *Commissioner of Internal Revenue* v. *First Trust & Deposit Co.*, 118 F. 2d 449, 452; and *Commissioner of Internal Revenue* v. *Stearns*, 65 F. 2d 371, 373, certiorari denied 290 U. S. 670.

The words "to be distributed currently" must be construed to mean income which by direction of the trust instrument *must* be paid or credited periodically to the beneficiaries. *Plimpton* v. *Commissioner of Internal Revenue*, 135 F. 2d 482, 486.

> "In each of these Acts * * * the intent is that annual income to a particular beneficiary from a trust estate shall be taxed to him as a separate unit of taxation where that income is 'distributed' to him. 'Distribution' as there used does not necessarily mean passing into the uncontrolled possession and disposition of the beneficiary. *It means separation and segregation from the trust estate so that it no longer forms any part or parcel thereof. The test set up by the stat-*

ute is whether the income passes from the trust estate which produced it and ceases to be subject to the terms and control of that trust." (Emphasis supplied) *Willcuts* v. *Ordway,* 19 F. 2d 917, 918 (1927).

The statutes referred to in *Willcuts* v. *Ordway,* just cited, are the Revenue Acts of 1916, 1918, and 1921. Each of those statutes uses the words "*to be distributed*", *and it is to these words that the decision in Willcuts* v. *Ordway refers.* That case has never been overruled or questioned. It was decided in 1927. The statutory language has nevertheless been continued in the subsequent enactments, presumably in agreement with such interpretation. To the same effect, see *Commissioner of Internal Revenue* v. *Plant,* 76 F. 2d 8, 9. That the fiduciary must be "*under a duty currently to distribute,*" see *Freuler* v. *Helvering,* 291 U. S. 35, 41, and see also *Mary Pyne Filley,* 45 B. T. A. 826, 830.

Nature of power held by petitioner under laws of Missouri.—It is true that petitioner was given a power to direct the current income during a particular year from accumulation and require its payment to himself. It is the duty of the trustees to comply with that request. The legal result is precisely the same as if the grantor had said: My son may (shall have power to, if he sees fit) demand of the trustees the payment of income before its accumulation into principal before the end of the current year. Whatever rights petitioner acquired under the trust were obtained according to the rule of the laws of Missouri. *Helvering* v. *Stuart,* 317 U. S. 154, 161.

No particular form of words is necessary to create a power. 49 *Corpus Juris,* p. 1253; *Turner* v. *Timberlake,* 53 Mo. 371; *In re McKallip's Estate,* 324 Pa. 438, 188 Atl. 343, 345; see, especially, *Gilman* v. *Bell,* 99 Ill. 144, 150; *In re Hart's Estate,* 30 N. Y. S. 2d 147, 148; and *Appeal of Elizabeth S. Sprague,* 8 B. T. A. 173, 179-180.

"A power is wholly ineffective until it is exercised; and other rights and interests in the subject-matter of a power are not affected by its mere existence and may rest or take effect, subject to the power, even though liable to destruction or divestment upon its execution." *Citizen's Bank of Lancaster* v. *Foglesang,* 326 Mo. 581, 31 S.W. 2d, 778, 782.

A power is no interest in the subject-matter of the power. *United States* v. *Field,* 255 U. S. 257; *Helvering* v. *Safe Deposit & Trust Co.,* 121 F. 2d 307; *Carver* v. *Jackson,* 4 Pet. 1, 93; *In re Armstrong; Ex parte Gilchrist,* 55 Law Journal Rep., Q.B. 578, 579; 17 Q.B.D. 521; and *Rhode Island Hospital Trust Co.* v. *Anthony,* 49 R.I. 339, 343, 142 Atl. 531, 533.

Rights obtained by a petitioner under local laws of Missouri are subject to the Federal definition of taxability. The Federal Revenue Acts must designate what interests, or rights, so created, shall be taxed if any tax is to apply. The Congress has not fixed a tax on such a possibility of receiving income, to be determined under the laws of Missouri, as petitioner had in the pending case. *Helvering* v. *Stuart,* supra, 162.

Trust estate here not entitled to any deduction.—In a situation where the income "is to be distributed currently," and only in such situation, is the trustee entitled to a *deduction.* (Section 162(b)). Both the Tax Court and the Circuit Court of Appeals found that the trust income was *not* "to be distributed currently" so as to entitle the trust estate to a deduction under Section 162(b).

Deductions are *privileges* and are narrowly construed. 1 *Mertens on Income Taxation,* Sec. 3.08; *White* v. *United States,* 305 U. S. 281, 292; *Interstate Transit Lines* v. *Commissioner of Internal Revenue,* 319 U. S. 590, 593; *Hales-Mullally, Inc.* v. *Commissioner of Internal Revenue,* 131 F.

2d 509, 511; *Langford Investment Co.* v. *Commissioner of Internal Revenue*, 77 F. 2d 468, 472.

If it be possible any longer to rely on statutory language, *the trustees are not entitled to any deduction for income which they are not required, and have no power, to distribute to a beneficiary.* Certainly the right to deduct is not clear or plain.

It is the settled doctrine of the Federal Courts that taxing statutes, in case of doubt, must be construed in favor of the citizen. The Government is bound by the letter. *Crooks* v. *Harrelson*, 282 U. S. 55, 61; *United States* v. *Merriam*, 263 U. S. 179, 187-188; *Gould* v. *Gould*, 245 U. S. 151, 153; *Benziger* v. *United States*, 192 U. S. 38, 55; *Hecht* v. *Malley*, 265 U. S. 144, 156; and *White* v. *Aronson*, 302 U. S. 16, 20.

Injustice resulting from decision below.—The Circuit Court of Appeals held the undistributed income from the trust estate taxable to petitioner under Section 22(a) by resorting to "implications" deducible from prior decisions which dealt with colorable trusts. In so doing the Court ignored the fact that there was created here a *real*, as distinguished from a merely *colorable, trust*. At the time of its creation, the grantor was engaged in the erection of a very large commercial building, involving many collateral obligations. Until these obligations were satisfied, there was to be no available income. The grantor was approaching the close of his life. What might happen in the course of an involved situation was unknowable. *It was not until fifteen years later that these prior obligations were so far satisfied as to permit the accrual of income for any other purpose.* To say that the instrument in question did not *originally* create an *actual* trust is an incredible suggestion. For the Commissioner of Internal Revenue, *at his election*, to say, in effect, that this integral instrument and transac-

tion *ceased to be a trust,* when it began to produce income, not required for the payment of debts, seems to us equally astonishing.

There being a *trust,* until its income has been, pursuant to the condition precedent of a demand, diverted from accumlation as directed by the trust and *segregated* from the trust—*until it has ceased to be a part of the moneys subject to the terms of the trust*—under the plain language of the statute, it must be taxed against the trust.

2. In applying Section 22(a) in disregard of the special statutes particularly relating to trusts, the decision below conflicts with principles applied in prior decisions of this Court.—In *Helvering v. Safe Deposit and Trust Co. of Baltimore,* 316 U. S. 56, the Court dealt with a bona fide actual trust. It held that an *unexercised* power of disposition by will on the part of a son beneficiary did not subject his estate to taxes for the property in the trust estate over which he exercised no power of disposition prior to his decease. In that case the Court held that the words "interest * * * of the decedent at the time of his death" in Section 302(a) of the Revenue Act of 1926 were not intended by Congress to include property subject to a general testamentary power *unexercised* by the decedent.

Because a specific statute, Section 302(f) of the Revenue Act of 1926, dealt with the subject of testamentary powers, this Court held that there was no room for the application of Section 302(a), whose provisions might, in the absence of the special statute, have been applied. In so holding this Court recognized the "principle" that the realities of the taxpayer's economic interest, rather than the niceties of the conveyancer's art, should determine the power to tax, but refused to apply the "principle" as a "guide" in the construction of an unambiguous statute.

In the pending case the language of Sections 161 and 162 is clear and unambiguous in its relation to income from a bona fide trust. The trust estate may not claim as a deduction income which is *not* "to be distributed currently by the fiduciary" and which the petitioner herein did not request or receive. When the meaning of a statute is plain, there is no room for interpretation. *Lake County* v. *Rollins*, 130 U. S. 62; *Lewis* v. *United States*, 92 U. S. 618. There was no occasion for the Circuit Court to apply the "principle" announced in the *Clifford* case, where no actual trust existed, as a "guide" in the construction of the unambiguous language of Sections 161 and 162 in the instant case where a real trust is involved, and such application is at variance with the principle applied by this Court in the *Safe Deposit and Trust Co.* case.

In *Helvering* v. *Wood*, 309 U. S. 344, the Court refused to hold the income from a short-term trust taxable to the grantor under Section 166 where no power to revest was held by the grantor. There, this Court gave effect to the language used in Section 166 whereby Congress treated a power to revest or revoke unlike a reversion in a short-term trust. The Court said (p. 347):

> "Congress seems to have drawn §166 with that distinction in mind, for mere reversions are not specifically mentioned. Whether as a matter of policy such nice distinctions should be perpetuated in a tax law by selecting one type of trust but not the other for special treatment is not for us. *We have only the responsibility of carrying out the Congressional mandate.* And where Congress has drawn a distinction, however nice, it is not for us to obliterate it. That seems to be the case here. Whether wisely or not, Congress confined §166 to trusts where there was a 'power to revest.' *The problem of interpretation under §166 is therefore quite different from that under §22(a).* The former is narrowly confined to a special

> class; the latter by broad sweeping language is all inclusive. *Helvering* v. *Clifford, supra.* Accordingly, the wide range for definition and specification under the latter is lacking under §166. *And so far as §166 is concerned no apparent or lurking ambiguity requires or permits us to divine a broader purpose than that expressed.*" (Emphasis supplied.)

Under the trust here in question the undistributed income not requested by petitioner is directed by the trust instrument to be added to the corpus. This undistributed income is "income accumulated or held for future distribution under the terms of the will or trust" within the unambiguous language of Section 161. No deduction for such undistributed income is allowed the trust estate under Section 162(b). Therefore, the undistributed income is taxable to the trust estate, and not to petitioner, under the plain language of Sections 161 and 162, in which "no apparent or lurking ambiguity requires or permits us [the Court] to divine a broader purpose than that expressed." To construe Section 22(a) as justifying taxation of the undistributed income to petitioner in this case is to emasculate and refuse to give effect to the unambiguous provisions of Sections 161 and 162 and "to write into the statute what is not there and what Congress has omitted to place there." This, the Court refused to do in *Helvering* v. *Wood, supra.*

The holdings of the Tax Court and the Circuit Court in this case are in direct conflict with the prior holding of the Board of Tax Appeals in *Appeal of Elizabeth S. Sprague*, 8 B. T. A. 173. In that case, among other things, the Board said (pp. 179-180):

> "The Commissioner held that because the petitioner could receive the income of the trust funds by making a written request therefor, the entire income is taxable to her, and determined the deficiency accordingly.

This position can not be sustained. The trust instruments all provided that the income should be added to the principal. To this extent such income was accumulated for unascertained persons or persons with contingent interests. There was the further provision that upon written request (by the settlor in one case and by the petitioner in the others) certain portions of the income were to be paid to the petitioner. Any such request constituted the exercise of a power which, to the extent that such power was validly exercised, removed such income from the provision for accumulation and made it distributable. Such distributable income was thereupon severed from the trust property and was taxable to the beneficiary under the provisions of section 219, quoted above. So much as was not distributable pursuant to the exercise of the power given by the trust instrument, remained a portion of the trust property, taxable to the fiduciary."

3. Necessity exists for clarification by this Court of "implications deducible" from prior decisions of Helvering v. Clifford, 309 U. S. 331, and Corliss v. Bowers, 281 U. S. 376.—

(a) *Analysis of issues involved and language used.*—In the *Clifford* case this Court applied the principle, that the realities of the taxpayer's economic interest should determine the power to tax, as a "guide to statutory interpretation," where the language of a statute and its statutory history did not afford more specific indications of the legislative intent. There, only a *colorable* trust had been created and this Court held that the income from that trust belonged to the grantor, who had never parted with dominion, and was therefore properly taxable to him under Section 22(a).

The Circuit Court of Appeals for the Eighth Circuit has misunderstood and misapplied the cases of *Helvering*

v. *Clifford*, 309 U. S. 331, and *Corliss* v. *Bowers*, 281 U. S. 376.

Neither those cases, nor any other cases ever decided by the Supreme Court of the United States, hold that the income of a *real* trust (as distinguished from a merely *colorable* trust), that is *not to be distributed currently by the fiduciary to the beneficiaries*, can be taxed to beneficiaries, who were not the creators of the trust.

The Supreme Court could not so hold, without *judicially* repealing the *particular* and *special* provisions of Sections 161 and 162 of the Revenue Acts of 1934 and 1936, providing for the taxation of *trusts*.

The Supreme Court itself has pointed out, in a recent case, the meaning of both the *Corliss* and the *Clifford* cases. Interpreting the case of *Corliss* v. *Bowers*, the Supreme Court has said:

> "In Corliss v. Bowers * * * he (the taxpayer) had disposed of the res but with a power to revoke at any moment. This right to realize income by revocation at the *settlor's* option *overcame the technical disposition.*" (Emphasis supplied.) *Helvering* v. *Stuart*, 317 U. S. 154, 168.

In other words, in the *Corliss* case there was no *real* or *actual* trust, because there had never been any *real* or *actual* transfer of the res.

Interpreting the case of *Helvering* v. *Clifford*, 309 U. S. 331, the Supreme Court has said:

> "The Commissioner, however, raised in the Court of Appeals and has pressed here the liability of the *donors* for taxation under Section 22(a) * * * on the ground that the trust incomes are chargeable to the donors under the rule of *Helvering* v. *Clifford*, 309 U. S. 331. *That is, whether after the establishment of the trust* the GRANTOR may STILL BE TREATED AS THE OWNER OF THE CORPUS *and* THEREFORE *taxable on its*

income." (Emphasis supplied.) *Helvering* v. *Stuart*, 317 U. S. 154, 167.

In the case of *Corliss* v. *Bowers, supra*, the grantor had reserved the power to modify, or alter in any manner, or to abolish the trust at will. The case fell squarely within Section 219(g) of the Revenue Act of 1924, which provided that "where the *grantor* of a trust has, at any time during the taxable year * * * the power to revest in himself title to any part of the corpus of the trust, then the income of such part of the trust for such taxable year shall be included in computing the net income of the grantor."

In that case, Mr. Justice Holmes uttered his frequently and loosely quoted *dictum* that "The income that is subject to a man's *unfettered* command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not." (Emphasis supplied.) The argument advanced by the Solicitor General in that case was that Congress did not exceed its power in holding the grantor accountable. It seems plain that Mr. Justice Holmes was justifying the *statutory provision*. He had no *right* to go further; and when he said "may be taxed" he meant "*may be taxed, as here, by statute*." Yet this sweeping phrase has frequently been cited and relied upon as fully inclusive of the doctrine of so-called "economic equivalence."

As to the *Clifford* case, but two questions appear there to have been presented. There the Commissioner (petitioner) asserted, first, that the *grantor remained*, in substance, the owner of the trust *res*, and its income was therefore taxable to him under Section 22(a) of the Revenue Act of 1934; and, second, that the income was properly taxable to *grantor* (under Section 166 of that Act) as the income of a revocable trust. The *second* assertion was unnecessary to decide; but the Court *did* decide, merely

that the grantor *continued to be the owner of the trust property and was therefore taxable on its income under Section 22(a).* That is all that was decided in the *Clifford* case.

(b) *Erroneous basis of decision of instant case by Tax Court.*—The majority of the Tax Court recognized in its opinion that (R. 89-90):

> "From the language of sections 161, 162, 166 and 167, *supra,* it would seem that they supply a complete, ultimate and exclusive plan or method whereunder and whereby the income of estates and trusts is taxed, in that the income is, under section 161, taxed to the trust and to the trust alone, except where distributed or distributable to beneficiaries it is, under section 162, taxed to them, or, in the instances prescribed in sections 166 and 167, it is taxed to the grantor. Our attention has been called to no exception specifically expressed in the statute, and we have found none."

but held that, despite unambiguous statutes to the contrary, the Court was compelled by *Corliss* v. *Bowers, supra,* and *Helvering* v. *Clifford, supra,* to rule that the petitioner herein, who was not the grantor of a colorable trust but a beneficiary of a *real* and *actual* trust, must be held to be the owner of and taxable upon undistributed income which he had never received, and which was not required "to be distributed currently by the fiduciary," and which at the end of each current year was converted into principal of the continuing trust. Five judges of the Tax Court dissented on the ground that the two prior decisions of this Court were not applicable to the facts of the pending case.

(c) *Wholly unjustified "implications" deduced by Circuit Court from prior decisions.*—The Circuit Court agreed with the minority opinion of the Tax Court that the undistributed income of the trust in suit was *not* income "to be distributed currently" by the fiduciaries to petitioner as beneficiary within the meaning of Section 162(b) (R. 362),

and had "no quarrel with the views expressed by the minority of the Tax Court relative to the applicability of §161(a)(1)" (R. 362) to wit: that the balance of the net income not so requested was "income accumulated or held for future distribution under the terms of the will or trust" within the meaning of Section 161(a)(1) [therefore, was taxable to the trust]. The Circuit Court said (R. 363):

> "In the absence of the construction and effect which has been accorded to §22(a) by the Supreme Court in *Helvering* v. *Clifford*, *supra*, * * * one could well believe that it was the intent of Congress that a bona fide trust should be a distinct taxable entity and that its undistributable 'fruits' should not be 'attributed to a different tree from that on which they grew'."

but affirmed the majority opinion of the Tax Court upon the reasoning that "implications which fairly may be drawn from the opinions of the Supreme Court in *Corliss* v. *Bowers*, 281 U. S. 376, 378, *Helvering* v. *Clifford*, 309 U. S. 331 * * * justify, if they do not compel, the conclusion that the undistributed net income of the trust in suit * * * was taxable to petitioner under §22(a)" (R. 363). In so holding the Circuit Court overlooked the subsequent interpretation of the *Corliss* and *Clifford* cases by this Court in *Helvering* v. *Stuart*, 317 U. S. 154, 167, 168. Obviously, deducible "implications" from decisions of this Court furnish no basis or legal justification for the obliteration of a specific statutory scheme for the taxation of trust income.

Mere "implications" are inadequate, and may not be used, to guide statutory interpretation in a case like the instant one in which the meaning of the statutes is plainly expressed. In the instant case the Circuit Court erred in resting its decision upon "implications" drawn from the opinions of the Court in *Corliss* v. *Bowers*, 281 U. S. 376, 378, and *Helvering* v. *Clifford*, 309 U. S. 331, because said implications are completely hostile to the express pro-

visions of Sections 161 and 162 of the Revenue Act governing taxation of the income of trusts.

In its opinion the Circuit Court of Appeals referred to *Harrison* v. *Schaffner*, 312 U. S. 579, which involved an *exercised* power over income; and to *Helvering* v. *Gordon*, 87 F. 2d 663, which involved *no trust* of any character, real or colorable, and therefore contained no possibility of the application of *special* and *particular* statutes governing trusts, such as Sections 161 and 162, herein referred to.

(d) *Answer to specific question will eliminate existing uncertainties.*—This Court ought, for the clarification of the law, to decide, authoritatively, a question it has never decided, namely: Whether the undistributed income of a real and actual trust, not required to be distributed currently, can in spite and disregard of the specific provisions of Sections 161 and 162 (governing the taxation of trusts) at the election of the Commissioner of Internal Revenue, be taxed under Section 22(a) to a beneficiary (other than the grantor) who has never demanded or received such income, which passes at the end of each year into the principal of a continuing trust, because an unexercised power to demand and receive such income during the current year has been granted to the beneficiary.

Conclusion

For these reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

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March, 1945.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

Sec. 22. Gross Income.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * * * *

Sec. 161. Imposition of Tax.

(a) *Application of Tax.*—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) *Computation and Payment.*—The tax shall be computed upon the net income of the estate or trust,

and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor). For return made by beneficiary, see section 142.

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * * * *

(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

The corresponding provisions of Sections 22(a), 161 and 162(b) and (c) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, are identical.

No. 1027

In the Supreme Court of the United States

October Term, 1944

Edward M[illegible], Petitioner

v.

Commissioner of Internal [illegible]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [illegible] CIRCUIT

BRIEF FOR THE [illegible]

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In the Supreme Court of the United States

October Term, 1944

No. 1027

Edward Mallinckrodt, Jr., petitioner

v.

Commissioner of Internal Revenue

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions in the Tax Court (R. 82–119) are reported at 2 T. C. 1128. The opinion of the Circuit Court of Appeals (R. 355–364) is reported at 146 F. 2d 1.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 10, 1945 (R. 364). A petition for rehearing was filed on January 24, 1945 (R. 371), and was denied on January 29, 1945 (R. 373). The petition for a writ of cer-

tiorari was filed on March 9, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in view of taxpayer's rights under a trust created by his father, he is taxable, under Section 22 (a) of the Revenue Acts of 1934 and 1936, on the net income of the trust payable to him on request but as to which he made no request.

STATUTES INVOLVED

Revenue Act of 1934, c. 277, 48 Stat. 680:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

Section 22 (a) of the Revenue Act of 1936, c. 690, 49 Stat. 1648, is identical with Section 22 (a) of the Revenue Act of 1934 as set out above.

STATEMENT

The facts as found by the Tax Court may be summarized as follows:

In 1918, the taxpayer's father created an irrevocable trust naming the taxpayer and the St. Louis Union Trust Company as trustees. The trust was in existence and was being actively administered by the taxpayer and the corporate co-trustee during the years in question. (R.84.)

The trust provided that the income was to be used first to assist in the completion of a building enterprise known as the Arcade Building. Out of any additional income there was to be paid to the taxpayer's wife the sum of $10,000 a year. The remainder of the trust income was to be paid to the taxpayer upon his request. All of the income which was not requested by the taxpayer was to be accumulated and added to the principal of the trust estate at the end of each year and was to be subject to such further disposition as was provided for the principal. Article Fifth of the trust instrument provided that the trustees, upon written request of the taxpayer during his lifetime, but subject to the approval of both trustees, should pay to the taxpayer such portion of the principal as they might deem wise for his benefit or the benefit of his family. The indenture further gave to the taxpayer a general power of appointment by will over the trust property and provided for gifts over in favor of his wife, chil-

dren, and other descendants in the event of his failure to exercise the power of appointment. It also provided for the termination of the trust during the lifetime of the taxpayer, in the discretion of the trustees, should they decide that such termination would be advisable or desirable in the interest of the Arcade Building enterprise or for any other reason which would be in the interest of the trust estate or the beneficiaries. Upon such termination, the taxpayer was to receive the trust corpus absolutely free of the trust. (R. 84-86.)

The grantor, the taxpayer's father, had, with his two brothers, founded the Mallinckrodt Chemical Works in 1867, and was also one of the founders of the St. Louis Union Trust Company. At the time of the creation of the trust he had already given to his son, the taxpayer, a great deal of property, including a controlling interest in the Chemical Works. At that time the taxpayer had three sons, and his father, in creating the trust, stated that his purpose was to provide for the taxpayer's children and grandchildren. (R. 86-87.)

By the end of 1933, the debts, obligations and burdens with respect to the Arcade Building enterprise had been discharged. Thereafter and during each of the taxable years in question (1934-1937), $10,000 was paid annually to the taxpayer's wife pursuant to the terms of the

trust. During 1934 and 1935, the taxpayer did not request or receive any of the income of the trust. During 1936, distributions were made at his direction to augment the income of a trust established for his wife and to certain charities. In 1937, an additional distribution was made in augmentation of the trust for his wife. These distributions, which totalled $19,075.82 in 1936 and $3,109.14 in 1937, consisted in part of nontaxable income and in part of taxable income but no portion thereof was reported by the taxpayer as taxable income in either year. In the years 1934, 1935, 1936 and 1937 the income of the trust which the taxpayer might have received upon request, but which he did not request and which was therefore added to the principal, consisted of $438,770.42, $241,377.25, $206,801.16 and $220,317.69, respectively. This income consisted partly of taxable income and partly of nontaxable income. (R. 87–88.)

The Commissioner of Internal Revenue determined that there should be included in the taxpayer's income for the years 1934 through 1937 that portion of the income of the trust (in excess of $10,000 per annum distributable to his wife) which constituted taxable income (R. 88). The Tax Court, five judges dissenting, sustained the Commissioner's determination (R. 82–119) and its decision was affirmed by the Circuit Court of Appeals (R. 354–364).

ARGUMENT

The Commissioner, the Tax Court, and the Circuit Court of Appeals have held that the taxpayer was vested with so many of the substantial attributes of ownership over the trust property and its income, that the income was properly taxable to him under Section 22 (a) of the Revenue Acts of 1934 and 1936, *supra*, p. 2. This conclusion is correct.

The income here involved was the taxpayer's for the mere asking. He had but to request the income in order to receive it in any particular year. Moreover, his right thereto and power thereover does not cease if he refrains from asking for the income in any year. The trust income which the taxpayer does not request for immediate payment is added to the corpus and the taxpayer has a general power of appointment over it. The income which he does not see fit to spend during his lifetime may thus be disposed of by him at his death. The power of appointment is general and unqualified and may be exercised in favor of whomsoever the taxpayer chooses. Furthermore the trustees, of which the taxpayer is one, may distribute to the taxpayer, in their discretion, such portion of the principal, including accumulated income, as the trustees deem wise for his benefit or for the benefit of his family. In addition, if the trustees in their discretion should decide to terminate the trust during the taxpayer's lifetime, the taxpayer would take all

of the trust property, including income and principal, free and clear of any trust. The decision below, holding that the income thus subject to the taxpayer's sweeping command should be taxed to him under Section 22 (a) is therefore well within the scope of *Helvering* v. *Clifford,* 309 U. S. 331. See also *Harrison* v. *Schaffner,* 312 U. S. 579, and *Corliss* v. *Bowers,* 281 U. S. 376. The principle to be followed was thus expressed by this Court in *Corliss* v. *Bowers, supra* (p. 378):

> The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not.[1]

The *Clifford* case did not rest, as the taxpayer contends (Pet. 17–18), upon any holding that the trust therein involved was not a real trust but was colorable only. The *Clifford* decision did not deny the reality of the trust therein involved; on the contrary the opinion expressly recognized that valid and subsisting rights had been created in the named beneficiaries by the declaration of trust, but held that nevertheless, because the grantor had retained so many of the substantial incidents of ownership over the trust property, it comported with the realities to tax the income

[1] "The broad sweep of [the language in Section 22 (a)] indicates the purpose of Congress to use the full measure of its taxing power within [Section 22 (a)'s] definable categories." *Helvering* v. *Clifford*, 309 U. S. 331, 334.

to him under Section 22 (a). So here, the decisions below do not deny the validity of the trust but hold that the taxpayer should be taxed upon its income (in excess of the $10,000 per annum which is distributable to his wife) because of his broad dominion and control over it.

The taxpayer seeks to distinguish the situation here involved from that in the *Clifford* case on the ground that the taxpayer here was not, as in the *Clifford* case, the grantor of the trust, but was simply the recipient of the powers vested in him by his father who was the grantor. The distinction is without substance. The determining fact is whether the taxpayer's command and control over the trust income is so nearly akin to ownership that for tax purposes he must be treated as the owner. In determining that issue, the source of the taxpayer's command and control—whether it derives from powers reserved by him in a trust which he has himself created or whether it derives from powers conferred upon him in a trust created by someone else—is entirely irrelevant. Whatever the source of the taxpayer's command, power, or control, if they are such as to give him the substantial attributes of ownership over the trust income, he must be treated as the owner for purposes of taxation. The distinction here urged by the taxpayer has been rejected by the Second Circuit in *Richardson* v. *Commissioner,* 121 F. 2d 1, certiorari denied, 314 U. S. 684, rehearing denied,

314 U. S. 714, and by the Fifth Circuit in *Jergens* v. *Commissioner*, 136 F. 2d 497, certiorari denied, 320 U. S. 784, both of which were cases substantially similar to the instant case.

The contention (Pet. 7–14) that Supplement E (Sections 161–169) of the several Revenue Acts since that of 1928 must be applied to the exclusion of Section 22 (a) in the determination of the taxability of trust income is in the teeth of the *Clifford* case. *Helvering* v. *Wood*, 309 U. S. 344, which was decided on the same day as the *Clifford* case, held that the income from a trust such as was involved in the *Clifford* case was not taxable to the grantor under Section 166, but the *Clifford* case held that nevertheless such income could be taxed to the grantor under Section 22 (a).

Helvering v. *Safe Deposit Co.*, 316 U. S. 56, referred to by petitioner (Pet. 14), was an estate tax case and involved wholly different statutory provisions. Likewise *Sprague* v. *Commissioner*, 8 B. T. A. 173, is clearly distinguishable. Although it was an income tax case, the *Sprague* case involved only Section 219 of the Revenue Acts of 1918 and 1921, which was the forerunner of Sections 161 and 162 of the Revenue Act of 1928 and later Acts, and did not deal with Section 22 (a). Thus the ruling below is not opposed to the *Sprague* decision, as taxpayer contends (Pet. 16–17), for it holds that the income here involved, although taxable to the taxpayer under Section

22 (a), would not be taxable to him under Sections 161 and 162.

CONCLUSION

The decision below is correct and there is no conflict nor any other reason for further review. The petition should therefore be denied.

Respectfully submitted.

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No. 1027

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

EDWARD MALLINCKRODT, Jr.,
Petitioner,

vs.

JOSEPH D. NUNAN, Jr., Commissioner of Internal Revenue

REPLY BY PETITIONER TO BRIEF IN OPPOSITION FILED BY RESPONDENT

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REPLY BY PETITIONER TO BRIEF IN OPPOSITION FILED BY RESPONDENT

Undistributed Income Remained Property of Trust Estate

The unexercised *power* of petitioner to demand of the trustees the payment of income from the trust did not, *ipso facto*, make such income *his*. Until the condition precedent of a demand had been complied with, the income remained the property of the trust, was not segregated or separated therefrom, and passed into the principal of the trust with the end of the current year, for further administration.

Under the statutory scheme for taxation of trusts, the undistributed trust income was taxable to the trust estate with no deduction allowable under Section 162(b) because, as the Circuit Court of Appeals correctly held, the undis-

tributed trust income was *not* "to be distributed currently" by the fiduciaries to petitioner (R. 362), and, hence was taxable to the trust under Section 161 (a) (1).

The trustees reported the undistributed income as trust income and paid the taxes thereon for each of the years 1934-1937, inclusive. The trustees and petitioner relied upon the unambiguous language of Sections 161 and 162, and upon the authority of *Appeal of Elizabeth S. Sprague*, 8 B. T. A. 173, which case was decided in 1927 and has never been expressly overruled. The unfairness of now taxing such undistributed trust income to petitioner under Section 22(a) by a "strained application" (R. 119) of the Supreme Court decision in *Helvering* v. *Clifford*, 309 U. S. 331 (decided in 1940), is patent and shocking to any concept of fair treatment between a Government and its citizens. Simple justice requires that Sections 161 and 162 should not be emasculated by judicial legislation through the guise of a strained construction of Section 22(a).

Respondent Erroneously Evaluates Control of Petitioner Over Trust Corpus

Seeking an escape from the specific statutory provisions governing taxation of the income of trusts, the respondent contends, in effect, that they ought not to apply here because the two trustees (subject to the approval of both) have power, upon the written request of petitioner, from time to time to distribute such portions of the corpus as they deem wise and for the benefit of petitioner or of his family. That provision, *in itself*, did not make petitioner the owner, in whole or in part, of the corpus of the trust estate. The presence of such an unexercised provision, *ipso facto*, did not destroy, and render impossible the continuance of, the trust.

Since the trust (in spite of such an unexercised provision) still persists, the plain provisions of Sections 161 and 162

(of the Revenue Acts of 1934 and 1936) must be applicable to the income of that trust.

Quite the same considerations apply to the power conferred upon both trustees under particular circumstances to terminate the trust.

The respondent further contends that petitioner was one of the two trustees named in the Trust Indenture; that he was empowered upon resignation to appoint his successor; and, therefore, that the corpus of the trust estate must be regarded as his, and under his sole dominion and control.

The respondent here overlooks the fact that any distribution from the corpus of the trust estate during petitioner's lifetime requires that both trustees concur in the finding that such distribution is wise under the circumstances and for the benefit of petitioner or of his family. The approval of the Trust Company, as co-trustee, is essential; and the only evidence upon that subject shows the Trust Company to have been independent and intractable. The corpus of the trust estate was plainly not petitioner's property nor under his sole control and dominion; and the *trust* subsisted. Why evade the plain statutes applicable to trust income?

The claim of control and domination over the trust corpus now advanced by respondent perpetuates the error in the notice of deficiency served upon petitioner in 1940. There, respondent erroneously predicated his claim, in part, upon the fallacious contention that petitioner "had full control and complete domination over the corpus of the trust" (R. 57, 59, 62 and 65).

Ignoring the specific provisions of the statutes respecting the taxation of the income of trusts—and still pursuing the *ignis fatuus* of "*economic equivalence*"—the respondent says that petitioner had a general power of appointment by will over the corpus of the trust property, and, therefore, that the income of the trust must be regarded as the income of petitioner. Such a power is certainly not a present

ownership of the corpus of the trust estate. Until exercised by an effective will, such a power leaves absolutely unaffected and unimpaired all other interests in both corpus and income of the trust property. The mere existence of such a power cannot, therefore, detract from the continuous existence of the trust, nor subtract from the trust estate the income or principal forming part thereof.

Prior to the Revenue Act of 1942, an *unexercised* general testamentary power of appointment held by a beneficiary under a trust did not cause the trust property to be included in his gross estate for purposes of taxation. *Helvering v. Safe Deposit & Trust Company of Baltimore*, 316 U. S. 56. It is now true that regardless of whether petitioner exercises the general power of appointment by will given him under the trust, a specific statute (Section 811(f) of the Internal Revenue Code, as amended by Section 403(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798) will cause any trust corpus in existence at the time of his decease to be included in his gross estate for taxation purposes. Of course, this will not happen if petitioner has relinquished the power of appointment within the time authorized by the Revenue Act of 1942. However, in no event will the undistributed trust income or the trust corpus escape the taxation prescribed by applicable statutes. Moreover, the undistributed trust income in this case which accrued during the period 1934-1937 cannot be taxed to petitioner under Section 22(a) without doing violence to Sections 161 and 162.

"Implications" Deducible From Clifford Case Furnish Mythical Standards for Guidance of Lower Courts and the Public

The case of *Helvering v. Clifford*, 309 U. S. 331, is considered to have established the general principle that the Government is not required to tax trusts as separate en-

tities where the terms of the trust indenture, the manner of its creation, and the method of its operation indicate that it is not to be distinguished from the *grantor* for tax purposes. In the instant case the petitioner is the beneficiary of a bonda fide trust instead of the grantor of a colorable trust.

There was no unanimity of opinion amongst the judges of the Tax Court in applying the doctrine of the *Clifford* case to the facts of the instant case. The majority opinion in the Tax Court held petitioner taxable on the undistributed income of the trust under Section 22(a) and in so doing relied upon an extension of the doctrine of the *Clifford* case and the case of *Corliss* v. *Bowers*, 281 U. S. 376. One judge concurred in the result reached "notwithstanding the substantial doubt which I have that the rule of *Helvering* v. *Clifford*, 309 U. S. 331, should be so extended." (R. 112) Two other judges concurred but did "not think it necessary to resort to the principle enunciated in the *Clifford* case in order to reach the conclusion embodied in the first point." (R. 113); they thought that the undistributed trust income was taxable to petitioner as income "to be distributed currently" by the fiduciaries to petitioner, as beneficiary, within the meaning of Section 162(b). One judge dissented without writing an opinion. Four other judges filed a vigorous dissent on the theory that the doctrine of the *Clifford* and *Corliss* cases was not applicable to the facts of the pending case, and that the undistributed trust income was taxable to the trust estate under Section 161 and 162. (R. 114-119).

The Circuit Court of Appeals agreed with the minority opinion of the Tax Court that the undistributed income of the trust in suit was *not* income "to be distributed currently" by the fiduciaries to petitioner as beneficiary within the meaning of Section 162(b) (R. 362), and had "no quarrel with the views expressed by the minority of the Tax Court relative to the applicability of § 161(a) (1)" (R. 362), to-wit,

that the balance of the net income not so requested by petitioner was "income accumulated or held for future distribution under the terms of the will or trust" within the meaning of Section 161(a)(1) and was, therefore, taxable to the trust under the specific provisions of the statutes. Nevertheless, the Circuit Court of Appeals affirmed the majority opinion of the Tax Court upon the basis of unjustified "implications" drawn from the prior opinions of this Court in the *Corliss* and *Clifford* cases.

The holdings of the majority opinion in the Tax Court and of the Circuit Court of Appeals in this case are in direct conflict with the prior holding of the Board of Tax Appeals in *Appeal of Elizabeth S. Sprague*, 8 B. T. A. 173. The minority opinion of the Tax Court held that the *Sprague* case was not in conflict with the *Clifford* and *Corliss* cases and that the *Sprague* case supported petitioner in the instant case (R. 116).

From the above it is obvious that there is manifest uncertainty among the judges of the lower courts in applying, or extending, the doctrine of the *Clifford* case. Furthermore, it seems clearly apparent that the Tax Court "in the search for a realistic construction of tax legislation" (R. 114) and the Circuit Court of Appeals have exceeded their authority in ignoring the specific statutory scheme for the taxation of trust income, provided in Sections 161 and 162, and have extended the doctrine of the *Clifford* case far beyond any scope intended by this Court. In *Webre Steib Company, Ltd.* v. *Commissioner*, decided February 12, 1945 and not yet officially reported, this Court considered questions involving the application of the "prima facie evidence" and "presumption" sections of Title VII, Revenue Act of 1936. The Court there recognized its "duty to apply as best we [the Court] may a statute Congress has seen fit to enact." The same duty applies with respect to an unambiguous statutory plan enacted for the taxation of

trust income. Such a legislative plan should not be emasculated by the lower courts upon the nebulous basis of "implications" deducible from prior decisions of this Court.

Conclusion

Unless this Court grants the petition for certiorari and intervenes to define and delimit the proper scope of the doctrine of the *Clifford* case, the erroneous "implications" drawn from that case by the lower courts will continue to defeat the legislative intent of the Congress as expressed in a specific statutory scheme for the taxation of trust income. Moreover, in the administration and creation of trusts, petitioner and the public are entitled to an authoritative decision that undistributed trust income from a *bona fide* trust is taxable to the trust as provided under unambiguous statutes, and that the existing statutory scheme for taxation of trust income has not been, and may not be, supplanted by such unwarranted "implications" as the various lower courts may choose to deduce from the prior decisions of this Court. It is respectfully submitted that the petition for writ of certiorari should be granted.

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March, 1945.

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No. 1027

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

EDWARD MALLINCKRODT, JR.,
Petitioner,

vs.

JOSEPH D. NUNAN, JR., COMMISSIONER OF INTERNAL REVENUE

PETITION FOR REHEARING FILED BY PETITIONER

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PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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PETITION FOR REHEARING FILED BY PETITIONER

As grounds for the reversal by the Court of its judgment rendered April 9, 1945, denying the petition for writ of certiorari, petitioner states:

I. The Eighth Circuit Court of Appeals Erred in Holding That the Undistributed Income of the Trust Estate Not Received by Petitioner Was Taxable to Him as Income under Section 22(a).

(a) *Meaning of word "income" in Section 22(a) is limited by the Sixteenth Amendment*—In expanding the doctrine of the *Clifford* case by interpreting Section 22(a) to permit taxation to a beneficiary of undistributed trust income never in fact received by him from the trust estate,

the Eighth Circuit Court of Appeals failed to take into consideration the fact that the Sixteenth Amendment imposes a restraint upon the definition of income in Section 22(a).

The Sixteenth Amendment reads:

> "The Congress shall have power to lay and collect taxes on incomes, from whatever sources *derived*, without apportionment among the several States and without regard to any census or enumeration." (Emphasis supplied.)

Since Congress is not given authority to define "income" so as to include anything that is not income to the taxpayer, the word as used in the Sixteenth Amendment must be given the meaning generally ascribed to it at the time the Amendment was adopted, for only that meaning could be said to have been in the contemplation of the State Legislatures when they adopted the Amendment.

In *United States* v. *Safety Car Heating Company*, 297 U. S. 88, the Court said (p. 99):

> "Income within the meaning of the Sixteenth Amendment is the fruit that is born of capital, *not the potency of fruition.* With few exceptions, if any, it is income as the word is known in the *common speech of men.*" (Emphasis Supplied.)

In *Eisner* v. *Macomber,* 252 U. S. 189, the Court, after quoting the Sixteenth Amendment, stated (pp. 206-207):

> "A proper regard for its genesis, as well as its very clear language, requires also that this Amendment shall not be extended by loose construction, so as to repeal or modify, except as applied to income, those provisions of the Constitution that require an apportionment according to population for direct taxes upon property, real and personal. This limitation still has an appropriate and important function, and is not to be over-

ridden by Congress or disregarded by the courts. * * * Congress cannot by any definition it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised. * * * For the present purpose we require only a clear definition of the term 'income', as used in common speech, in order to determine its meaning in the Amendment; and, having formed also a correct judgment as to the nature of a stock dividend, we shall find it easy to decide the matter at issue.

"After examining dictionaries in common use (Bouv. L. D.; Standard Dict.; Webster's Internat. Dict.; Century Dict.), we find little to add to the succinct definition adopted in two cases arising under the Corporation Tax Act of 1909 (Stratton's Independence v. Howbert, 231 U. S. 399, 415; Doyle v. Mitchell Bros. Co., 247 U. S. 179, 185)—'Income may be defined as the gain derived from capital, from labor, or from both combined,' provided it be understood to include profit gained through a sale or conversion of capital assets, to which it was applied in the Doyle Case (pp. 183, 185)."

In *Sprouse* v. *Commissioner*, 122 F. 2d 973 (Cert. den. 315 U. S. 810) the Court stated (pp. 975-976):

"The meaning of the word 'income' in the Sixteenth Amendment is the same as the word has when "used in common speech" and is the gain derived from, or through a sale or conversion of, capital assets, from labor, or from both combined. *Eisner* v. *Macomber, supra,* 252 U. S. at page 207, 40 S. Ct. at page 193. The same case explains that income is '*not* a gain *accruing* to capital; not a *growth* or *increment* of value in the investment; but a gain, a profit, something of exchangeable value, *proceeding from* the property, *severed from* the capital, however invested or employed, and *coming in,* being '*derived*'—that is, *received* or *drawn* by the recipient (the taxpayer) for

his *separate* use, benefit and disposal—that is income derived from property. 252 U. S. at page 207, 40 S. Ct at page 193." (Emphasis supplied by the Court.)

Moreover, to be taxable under the amendment, the income must have been *"derived" by the person sought to be taxed* for it. As stated in the Sprouse case *supra, he must have "received" it "for his separate use, benefit and disposal"*.

In the instant case the "income" arose from capital assets or transactions of the trust estate and was derived and owned by the trustees, not by petitioner.

Under the trust agreement as construed by the property law of Missouri, there was tendered to petitioner as a gift, so much of the annual net income of the trust estate as he might desire, but the tendered gift was upon two conditions precedent, viz; that he accept it in writing designating the amount accepted; and the second essential, as a condition precedent to a completed gift vesting the title in him, was the payment to him by the trustees of the amount so accepted (requisitioned) by him. Petitioner could not receive any of the trust income, nor could the trustees pay any of it to him, nor could he "derive" any of it, except upon performance of all of the three legal requirements for a completed gift, viz: (1) a tender of the gift,—contained in the trust instrument; (2) his acceptance of the offer,—expressed by his written request; and (3) the delivery (payment) to him of the amount requested; *Gosney* v. *Costigan*, 326 Mo. 1215, 1228; *Thomas* v. *Thomas*, 107 Mo. 459, 463; *Cartall* v. *St. Louis Union Co.*, 348 Mo. 372, 385.

In the instant case the Eighth Circuit Court of Appeals interpreted "income" under Section 22(a) in disregard of the limitations imposed by the Sixteenth Amendment. Under the trust agreement petitioner could not receive the

income of the trust from the trustees, and they could not pay it to him, unless he made demand upon the trustees for payment of the income. In 1934 and in 1935 no demand for payment of such income was made upon the trustees by petitioner. In 1936 and in 1937 only small amounts were paid by the trustees to third parties at the request of petitioner. The undistributed trust income for each of the four years became part of the principal of the trust estate. Obviously, petitioner did not "derive", have possession or use of, or title to, any part of the undistributed trust income which he did not demand or receive; nor did he have title to or dominion over any part of the corpus of the trust. Nevertheless, the Eighth Circuit Court of Appeals taxed the undistributed trust income to petitioner on the theory that "the power of petitioner to receive this trust income each year, upon request, can be regarded as the equivalent of ownership of the income for purposes of taxation." (R. 363.) The Court ignored the obvious fact that petitioner received no income because he did not exercise the power. Such *lack of income* to petitioner was not "income *derived*" within the meaning of "income" in Section 22(a), or under the Constitution, or as the word "income" is known in the "common speech of men".

(b) *Section 22(a) is not a tax-enacting statute whereas Section 161(b) imposes a tax upon the fiduciary.*—In its opinion the Eighth Circuit Court of Appeals relies upon Section 22(a) as the authority for levying the tax on petitioner as the beneficiary of the trust. Section 22(a) is not a tax-enacting statute. No income tax is fixed or levied by it. It is a definition section. Moreover, nowhere in Section 22(a) is there any language which fastens upon a beneficiary the undistributed income of a trust, which income has never been received by the beneficiary but has been retained by the trust estate.

On the other hand, Section 161(b) specifically directs that the tax upon the net income of a trust estate shall be paid by the *fiduciary*. In the instant case the undistributed trust income not demanded by or paid to petitioner as beneficiary became part of the principal of the trust at the end of each year and was "income accumulated or held for future distribution under the terms of the will or trust" within the unambiguous provisions of Section 161(a)(1), and was taxable solely to the trust estate under Section 161(b).

(c) *Section 22(a) does not tax to petitioner such possibility of receiving income as he held under the trust.*—In the instant case an irrevocable trust was created by the grantor under the laws of Missouri, and it is these laws that govern the legality, construction and administration of the trust. *Helvering* v. *Stuart*, 317 U. S. 154, 162. Under the laws of Missouri "a power is wholly ineffective until it is exercised" and a "power" is not the equivalent of ownership of the income which is subject to the power. *Citizens Bank of Lancaster* v. *Foglesang*, 326 Mo. 581, 31 S. W. 2d 778, 782.

The Federal Revenue Acts must designate what interests or rights created under State laws shall be taxed, if any tax is to apply. The Congress has *not* fixed a tax (under Section 22(a) or otherwise) on such a *possibility* of receiving income, to be determined under the laws of Missouri, as petitioner had in the pending case. Quite to the contrary, the Congress has specifically provided in Section 161(b) that the tax upon the net income (including undistributed income) of a trust estate shall be paid by the *fiduciary*. Therefore, the Eighth Circuit Court of Appeals not only expanded the meaning of Section 22(a) by judicial legislation but at the same time it judicially repealed Section 161(b) of the Revenue laws. Such a decision puts the Commissioner of Internal Revenue in a position where he may,

at will, fix the tax on trust income upon the trust estate, or the beneficiary, depending upon which allocation will produce the greatest revenue. Obviously, the specific language of Section 161 gives to the Commissioner no such authority. This Court should not permit him to assume such power through the medium of misconstruing Section 22(a) and expanding the doctrine of the *Clifford* case.

In other situations, complete power over income has not been sufficient to make the income taxable to the holder of the power. If a man incorporates his business and wholly owns the corporation, he is not taxed on gains from sales by the corporation of its property, but such income is taxable to the corporation. *Moline Properties Inc.* v. *Commissioner*, 319 U. S. 436. If the corporate entity must be recognized in the taxation of the income of a corporation, the same reasoning requires that the *trust entity* established by Sections 161 and 162 must be recognized in the taxation of the undistributed income of a trust.

II. Adherence to, and Fair Interpretation of, Statutes Taxing Trust Income Are Matters of Vital Public Importance.

The Eighth Circuit Court of Appeals failed to give any effect to Sections 161 and 162 after correctly analyzing these sections. It brushed the sections aside and based its decision upon the novel theory that "implications" deducible from the *Clifford* case superseded the clear Congressional intent expressed in Section 161(b) to tax the undistributed trust income solely to the *fiduciary*.

Thousands of trusts are in existence and were created in reliance upon the legislative policy for their taxation as expressed in unambiguous statutes since 1928. Many trusts are being and will be created daily throughout the United States. In a large proportion of such trusts the protection

of wives, children and dependents will be the controlling motive. In fairness to all parties concerned there should be stability in the interpretation and application of unambiguous taxing statutes upon which the public has the right to rely. Judicial repeal of such statutes on any pretext whatsoever will have an unjust retroactive effect which cannot be remedied in many instances. Forcing the public to speculate upon the effect of the judicial repeal of existing statutes taxing trust estates will impose undue hardships upon those who seek to guide their conduct under the statutes as enacted by the Congress.

Judicial repeal of the statutes taxing trust estates will inevitably force the public to demand that the Congress exercise its legislative authority by enacting new legislation to set aside decisions which disregard the Congressional intent. This the Congress recently did in amending Section 167 by enacting Section 134 of the Revenue Act of 1943 so as to consummate a retroactive legislative repeal of *Helvering* v. *Stuart*, 317 U. S. 154. See *Estate of Banfield*, 4 T. C. 29, 31-33. In the meantime, and until the Congress does legislate to repeal such decisions, the public will suffer from the chaotic condition of the trust laws designed to tax income from trust estates due to the unjustified assumption of legislative authority by the courts based upon inferences from the *Clifford* case and other cases.

The various lower courts have no semblance of adequate standards to guide them in applying the so-called Clifford doctrine. In *Stockstrom* v. *Commissioner*, decided March 23, 1945, by the Circuit Court of Appeals for the Eighth Circuit and not yet officially reported, Judge Sanborn (who wrote the opinion in the instant case), in recognizing the utter inability of the lower courts to apply the Clifford doctrine, said (P-H, 1945, ¶ 72,465):

> "I think the Tax Court might well have decided this case in favor of the taxpayer, but the standard for

determining to whom the income was taxable is presently so vague and indefinite that I have no conviction as to whether the decision of the Tax Court is, as a matter of law, right or wrong. I therefore concur. I think it is unfortunate that courts which are required to determine such controversies as this must express opinions which are obviously little more than guesses. The number of cases in which the doctrine of *Helvering v. Clifford*, supra, is invoked indicates the difficulty which the Bench and Bar are having in applying that doctrine. See Shepard's United States Citations on 309 U. S. 331."

Another instance in which a Circuit Court of Appeals is uncertain about how to apply the doctrine of the *Clifford* case to a given state of facts is found in *Commissioner v. Batemen*, 127 F. 2d 266, in which the Circuit Court of Appeals of the First Circuit, in a unanimous opinion upholding a decision of the Board of Tax Appeals, said (p. 271):

> "Frankly we do not know how the Supreme Court would apply the general criteria of the Clifford case to the facts now before us. We have to make our decision with such light as is available to us."

Again, after reviewing many prior decisions including that in the *Clifford* case, the Court said (p. 274):

> "This review of the cases still does not indicate to us as clearly as we should wish, how the case at bar should be decided."

So it appears that confusion exists in at least two of the Circuit Courts of Appeals as well as in the Tax Court, about just what the doctrine of this Court in the *Clifford* case is, and what its limitations are.

The Tax Court was divided on the applicability of the *Clifford* case to the instant case. Circuit Judge John B. Sanborn who wrote the opinion of the Court of Appeals in the instant case, has more recently expressed his doubt

in *Stockstrom* v. *Commissioner,* cited and quoted from above; and the Circuit Court of Appeals of the First Circuit has expressed its uncertainty in the above quotations from the opinion in *Commissioner* v. *Bateman.*

It is respectfully submitted that these clear evidences of confusion in the minds of at least two different Circuit Courts of Appeals, as well as in the Tax Court, constitute strong evidence of the urgent public need for a ruling of the Court in the instant case, as to whether the Circuit Court of Appeals was justified in ignoring the statutory requirements of Sections 161 and 162, merely because of a judicial inference from the Clifford decision, thereby allowing such inference to override expres provisions of a statute.

Conclusion

For these reasons it is respectfully submitted that this petition for rehearing should be granted and that the Court should reverse its prior judgment and grant the petition for writ of certiorari.

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April, 1945.

Certificate of Counsel

I, Mac Asbill, of counsel for petitioner, do certify that the foregoing petition for rehearing is presented in good faith and not for delay.

Mac Asbill.

End